

BROUDE V McINOSH AND OTHER 1998(3)SA60(SCA)

SUMMARY

- Appellant's action for damages as a consequence of paralysis of the left side of the face caused by alleged negligent conduct.
- The Appellant's claim was founded upon on conduct before, during and after an operation.
- The claim in respect of conduct before the operation was based on the alleged failure to apprise the Appellant of the risks regarding the operation and the alternatives that existed.
- The Court held that it was a strange notion that the surgical intervention of a medical practitioner whose sole object was to alleviate pain or discomfort, had explained to the patient what was intended to be done and had obtained the patient's consent should be described as an Assault simply because the practitioner had omitted to mention the risk considered to be material enough to have warranted disclosure and if disclosed may have resulted in the patient withholding consent.
- This was a bizarre result which suggested that the approach was unsound – either it was an assault at the time of its commission or it was not.
- As to the remaining allegations of negligence relating to the manner in which the operation was performed and the manner in which the Appellant was dealt with thereafter the Court held that it was unable to conclude that the *Court a quo* had erred in its overall assessment of those aspects of the case.
- When a patient has suffered greatly because of something that has occurred during an operation a Court must guard against its understandable sympathy for the blameless patient

tempting it to infer negligence more readily than the evidence objectively justifies and more readily than it would have done in case not involving personal injury.

- Any such approach to the matter would be subversive of the undoubted incidence of the onus of proof of negligence in our law in an action for damages on the grounds of the medical practitioner's negligence.
- The decision of the *Court a quo* confirmed.